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American Press Association v. United States, 245 Fed. 91, 93-94 (C.C.A. 7, 1917) 42

Beegle v. Thomson, 138 F.2d 875, 881 (C.A. 7, 1943), cert. denied, 322 U.S. 743 42

Brown Shoe Co. v. United States, 370 U.S. 294 ..... 36, 41, 42

Chicago Board of Trade v. United States, 246 U.S. 231, 238 36

International Shoe Co. v. Federal Trade Commission, 280 U.S. 291 ..... 36, 41, 42

Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958) 8, 35, 39

Northern Securities Co. v. United States, 193 U.S. 197, 326-27 40

Times-Picayune v. United States, 345 U.S. 594 ..... 4, 11, 16

Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582 (C.A. 1, 1960), cert. denied, 365 U.S. 833 43

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United States v. Aluminum Co., 148 F.2d 416 (C.A. 2, 1945) 43

United States v. Associated Press, 52 F. Supp. 362, 372 (S.D. N.Y., 1943), aff'd, 326 U.S. 1 (1945) 4

United States v. DuPont & Co. (General Motors), 353 U.S. 586, 597 25

United States v. First National Bank of Lexington, 376 U.S. 665 42

United States v. Harte-Hanks Newspapers, Inc., 170 F.Supp. 227 (N.D. Tex., 1959) 43

United States v. Paramount Pictures, 334 U.S. 131....40, 43

United States v. Penn-Olin Co., 378 U.S. 158, 170.....36-37, 38, 39-40

United States v. Philadelphia National Bank, 374 U.S. 321 42

United States v. Sealy Inc., 388 U.S. 350, 357, n. 5 39

United States v. U. S. Steel Corp., 251 U.S. [illegible], 46-47 42

Walker Process Equipment, Inc. v. Food Machinery & Chem. Corp., 382 U.S. 172, 178 39

White Motor Co. v. United States, 372 U.S. 253 (1964) 35, 36, 39

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Audit Bureau of Circulations: Publisher's Statement for 6 mos. period ending March 31, 1968 14

Boylan, *The Hutchins Report: A Twenty Year View,* Columbia Journalism Review (Summer 1967), p. 11 5

2 Chafee, *Government and Mass Communications* (1947), p. 652 13

Davenport, *Newspaper Circulation,* Dubuque, Iowa, 1949, p. 1 18

Economist (London), May 22, 1965, p. xi 14

Editor and Publisher, Jan. 26, 1963, p. 9; *id.,* Aug. 31, 1963, p. 10; *id.,* May 9, 1964, p. 18 30

Editor and Publisher, Aug. 6, 1966, p. 9 12

Editor and Publisher, September 4, 1965, p. 13 30

Editor and Publisher, Oct. 16, 1965, p. 15 13

Kinter, *The Changing Pattern of the Newspaper Publishing Industry,* The American Journal of Economics and Sociology, Vol. 5, 1945, p. 43 .....10, 16

Lee, *The Basic Newspaper Pattern,* The Annals of the American Academy of Political and Social Science, Vol. 219, (January, 1942) p. 44 4

Local Monopoly in the Daily Newspaper Industry, 61 Yale L. J. 948 (1952) 5, 10, 20, 21, 29

McCann-Erickson estimates, published annually in Printer's Ink 16

McClure and Fulton, *Advertising in the Printed Media,* New York, 1964, p. 59 .....16, 20

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McEvoy, *The Reader Needs a 10¢ Newspaper,* Nieman Reports (July 1954), p. 6 28

Mott, *American Journalism,* p. 635 (1947) 20

Neurath, *One Publisher Communities: Factors Influencing Trend,* 21 Journalism Qu. 230, 240 (1944).... 10

Nixon, *Concentration and Absenteeism in Daily Newspaper Ownership,* 22 Journ. Qu. 97 (1945) 23

Nixon, *The Problem of Newspaper Monopoly,* in *Mass Communications,* Wilbur Schramm, editor, Second Edition 1960, p. 243 (Originally published in Communications in Modern Society, University of Illinois Press, 1948) 14

Nixon, *Trends in U. S. Newspaper Ownership: Concentration with Competition,* 14 Gazette No. 3, 1968, International Journal of the Science of the Press (Univ. of Amsterdam, Holland) p. 181, cited as Nixon, 1968 .....11, 13, 14, 33

Nixon and Ward, *Trends in Newspaper Ownership and Inter-Media Competition,* 38 Journ. Qu. 3, 5 (Winter 1961) 10

North, *History and Present Condition of the Newspaper and Periodical Press of the United States* (U.S. Census Office, 1884), p. 98 27

Pollard, *Principles of Newspaper Management,* New York 1937, pp. 6-15 10

Pollard, *Spiraling Newspaper Costs Outrun Revenues* 1939-1949, 26 Journalism Qu. 270 (1949) 16

Poynter, *The Economic Problems of the Press and the Changing Newspaper,* Annals of the American Academy of Political and Social Science, Vol. 219, January 1942, pp. 82, 85-86 23

PAGE

Ray, *Economic Forces As Factors in Daily Newspaper Concentration,* 29 Journalism Qu. 31, 41 (1952).... 5

Reddaway, *The Economics of Newspapers,* The Economic Journal, Vol. LXXIII, June 1963, p. 201....18, 19, 20, 21, 29

Rogers, *Newspaper Building* (N.Y. 1918), p. 82 28

Thorpe, *The Coming Newspaper,* New York, 1915, p. 19 10

U.S. Bureau of the Census, U.S. Census of Population:

1960, Vol. 1, *Characteristics of the Population:*

Part A, Number of Inhabitants 11

Part 4, Arizona, Table 11, pp. 4-10 12

Willey, *The Functions of the Newspaper,* The Annals of the American Academy of Political and Social Science, January 1942, Vol. 219, p. 19 17

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 243

CITIZEN PUBLISHING COMPANY, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court
for the District of Arizona.

BRIEF FOR AMICI CURIAE

This brief is presented on behalf of a number of newspaper publishers, as *amici curiae*.[1] The consent of the

[1]Albuquerque (N. Mex.) *Journal*, Albuquerque *Tribune*; Birmingham (Ala.) *News*, Birmingham *Post-Herald*; Bristol (Va.) Newspaper Printing Corp.; Charleston (W. Va.) *Daily Mail*, Charleston *Gazette*; Columbus (Ohio) *Citizen-Journal*; Oil City (Pa.) *Derrick*; Franklin (Pa.) *News-Herald*; Deseret News Publishing Co., Salt Lake City, Utah; El Paso (Tex.) *Herald-Post*, El Paso *Times*; Evansville (Ind.) *Press*; Ft. Wayne (Ind.) *News Sentinel*; Knoxville (Tenn.) *News-Sentinel*; Nashville (Tenn.) *Banner*, Nashville *Tennessean*; Pittsburgh (Pa.) *Press*; Salt Lake City (Utah) *Tribune*; San Francisco (Calif.) *Chronicle*, San Francisco *Examiner*; Tulsa (Okla.) *Daily World*, Tulsa *Tribune*.

parties to the filing of this brief has been filed with the clerk of the Court.

The publishers for whom this brief is submitted have operating agreements similar in many respects to that held unlawful by the District Court in this case.[2]

QUESTION TO BE DISCUSSED

The peculiar economics of the newspaper industry has made it impossible for two newspapers operated completely separately to continue to survive in most American cities. For a morning and an evening paper each to have its own production plant means that each is idle a substantial part of the day; a single plant can produce both papers much more economically. And in many cities, including those in which these *amici* operate, only when, in addition, all the business activities of the papers are combined, including the advertising and circulation departments, is there sufficient reduction of costs to permit both papers to survive as separate and independent editorial entities. In over 20 cities such a combination of the business functions of morning and evening newspapers has had this beneficial effect.

The question which is vital to these *amici*, and which is likely to become so for other newspaper publishers in the cities in which two publishers still survive, is:

Whether, in communities in which completely separate morning and evening newspapers cannot survive, the antitrust laws preclude the combining of the business de-

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[2] The operating agreements, of course, differ in a number of respects both among themselves and as compared to the Tucson agreement; however, all provide for a merger or consolidation of mechanical, circulating and advertising functions as a means of reducing costs.

partments of two or more existing newspapers so as to permit the continuance under separate and independent editorial direction of papers owned by different publishers.

In its practical aspect, the question is whether the antitrust laws are to be interpreted so as to produce complete newspaper monopolies in such cities.

Strangely enough, this will result if the Antitrust Division's position is accepted. For the Government contends that the essential ingredients of a merger of the business departments render such an arrangement unlawful *per se*—even though this avoids the complete monopoly which would otherwise result, and even though a complete merger would have been lawful if one of the two newspapers were failing, as the court below at one point conceded.[3]

POSITION OF THESE AMICI

The position of these *amici*, which they urge the Court to adopt, is that in a failing business situation—and our premise is that such a situation exists when a partial merger is undertaken—an arrangement which preserves a substantial area of competition is lawful. It should not be tested by more stringent tests than are applied to a com-

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[3] "Mr. MacLaury: Well, would Your Honor then think if they had dissolved Star or Citizen or both and simply merged them all into one company, then the failing company doctrine would apply?

"The Court: I would say that—

"Mr. MacLaury: Assuming all the other factors.

"The Court: I think if Star acquired all of Citizen's assets and gave stock to the owners of Citizen, it probably would. I would say that the Government wouldn't have much chance in this particular case of attacking that acquisition." (Transcript of February 15, 1967, p. 412.)

plete merger, which eliminates all competition. The mere statement of the proposition demonstrates that the contrary view makes no antitrust sense.

The Importance of the Preservation of Independent Editorial Voices

This question is particularly important, we submit, because the public interest in "the dissemination of news from as many different sources, and with as many different facets and colors as is possible" is not merely an antitrust interest in preserving competition because of its economic benefits. "That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment." *Times-Picayune* v. *United States*, 345 U.S. 594, 602-03 (quoting from Judge Learned Hand in *United States* v. *Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y., 1943), aff'd, 326 U.S. 1 (1945)).

The value to the community of two editorial voices instead of one provides a strong reason for not interpreting any statute, and the antitrust acts in particular, in a way which will lead to a newspaper monopoly. In the absence of separate ownership, there is the possibility "that freedom for minority expression will be curtailed, especially in a period when political feelings tend toward extremes and when one extreme sees not only no good but positive danger in the beliefs of the other. The American system thrives best when ideas strike sparks and opposites rub each other into usable size and shape."[4] "Singleness of

[4]Alfred M. Lee, *The Basic Newspaper Pattern*, The Annals of The American Academy of Political and Social Science, Vol. 219, (January, 1942) p. 44.

publisher control over both dailies, however, generally results in singleness of editorial policy and may also cause uniformity of news policy and duplication of news reports in both papers."[5] For these reasons, the publication of separately owned newspapers is likely "to promote effective working of the democratic process."[6] Thus, "[t]he joint publishing plan of local combination is considered more socially defensible than outright ownership of all combination units by one publisher."[7]

The Commission on Freedom of the Press concluded that there was danger that the antitrust laws might be construed so as to limit "voices in opposition," and "the freedom and effectiveness of the press."[8] This Court should, we submit, strive to avoid an interpretation which is incompatible both with antitrust policy and with these other basic interests upon which our constitutional system vitally depends.

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[5] *Local Monopoly in the Daily Newspaper Industry*, 61 Yale L.J. 948, 956 (1952).

[6] *Id.*, at 957.

[7] Royal H. Ray, *Economic Forces As Factors in Daily Newspaper Concentration*, 29 Journalism Qu. 31, 41 (1952).

[8] James Boylan, *The Hutchins Report: A Twenty Year View*, Columbia Journalism Review (Summer 1967), p. 11.

SUMMARY OF ARGUMENT

I.

In many communities competing newspapers can exist only if merger of the business activities of the existing newspapers is permitted.

A. The number of cities in which there have been one or more competitive newspaper publishers has consistently and steadily declined over the past 60 years—from 689 in 1909-1910, to 66 in 1968, 21 of which had joint operating plans similar to that in Tucson. In the absence of such a plan the pattern has been for two publishers in only the largest cities, and not in all of them. No successful metropolitan daily newspaper in a city of over 200,000 population has been started in over 25 years. See fn. 19, p. 13, *infra*.

So widespread a trend is not attributable to isolated phenomena in particular cities. It is due to economic forces which have affected the entire newspaper industry. These include greatly increased costs, loss of advertising revenues to other media, and the demand for much larger newspapers providing readers with greatly expanded service.

These factors have been aggravated by the unique nature of the newspaper business. With few exceptions, newspapers cannot increase their revenues by expanding geographically; each is tied to its own community. A newspaper must be redesigned each day and what is not sold that day is of value only to the junk man. Costs are not proportional to sales; most costs are incurred before the first copy is sold, and the newspaper advertiser tends to concentrate his patronage in the paper with the larger circulation or advertising drawing power. This eventually

becomes disastrous to the weaker paper, which will have less money for its news and editorial activities, and this in turn will adversely affect its circulation and advertising. This downhill spiral process, caused by all of the factors referred to above, has led to the disappearance of second publishers in most cities.

B. Once one of the newspapers in a city starts the downward spiral to failure, the consequence will be either that: (1) the paper will disappear and not be replaced; (2) the surviving publisher will either acquire the paper before it expires or move into the field vacated by it; or (3) the two newspapers will enter into a joint operating plan which, because of the economy resulting from the merger of their business functions, enables both to continue otherwise separate and independent publications.

The first two alternatives leave the community with only one publisher. The third is clearly more consistent both with antitrust policy and with the strong community interest in fostering the expression of diverse views. And it eliminates no competition which would not have disappeared in any event.

C. For the above reasons, the "failing business" doctrine is applicable. Once it is established that one of the two newspapers in a community will not otherwise survive, the merger of the business functions so as to preserve the existence of two editorially independent papers cannot reasonably be said to violate the antitrust laws.

The Government contends that if one paper fails a new publisher will enter the market in its place. But this unsubstantiated conjecture is completely inconsistent with what has been happening in the industry for three quarters of a century. By hypothesis, we are concerned with com-

munities which cannot support two completely separate newspapers. If the weaker fails, only the surviving publisher would be able to take its place. If a newspaper with established circulation and goodwill could not profitably remain in the market, a newcomer starting without such advantages would have even greater handicaps. In contrast to other industries in which a newcomer can gradually grow in size, a new newspaper cannot attract sufficient advertising and circulation unless it appears initially full-blown as an equal to the existing paper. This is well known to publishers or potential publishers.

Economics and history thus combine to teach that the only way in which two separately owned metropolitan newspapers can continue to be published in most communities is through a partial merger of the sort undertaken in Tucson.

II.

Where editorial independence can only be preserved by joinder of the business functions of two newspapers, one of which would otherwise fail, the joinder does not violate the antitrust laws. The Government's attempt to fit the joint operating plan into the *per se* categories disregards the fact that the effect is to preserve news and editorial competition which would otherwise disappear—not to eliminate competition which would otherwise exist.

The *per se* doctrine is not a mechanical formula unrelated to the purposes of the antitrust law. It applies to agreements having a "pernicious effect on competition" and lacking "redeeming virtue" (*Northern Pacific R. Co.* v. *United States,* 356 U.S. 1, 5), not agreements which prevent competition from completely disappearing. Apart

from this, the *per se* categories do not apply. What the Government calls "price fixing" and "profit pooling" are merely essential ingredients of any merger or joint venture—the merged company fixes prices for the products it sells and divides its profits among its owners. If this were *per se* illegal, every merger would be unlawful. This clearly is not so, particularly when one of the two enterprises would otherwise fail.

If the joint operating agreement is to be pigeon-holed, it must be classified as a "merger" or "joint venture", which are not unlawful *per se* but only when they have an anti-competitive effect—as they do not when the effect is to save a failing newspaper. There is no reason why, in a "failing business" context, a merger of less than all the activities of two companies, which enables the unmerged portion to remain competitive, should be governed by a more stringent test than a complete merger. The Government's argument to the contrary has no rational basis in antitrust policy.

For the above reasons, a joint operating plan does not violate Sections 1 or 2 of the Sherman Act, or Section 7 of the Clayton Act. Under Sections 1 and 7, the "failing business" doctrine applies to mergers and joint ventures. And, since the natural monopoly which would result from the failing of the weaker newspaper in the absence of a joint plan would not violate Section 2, a partial monopoly resulting from the same forces, but which preserves some competition, cannot be unlawful. Some competition is better than no competition at all.

ARGUMENT

I.

IN MANY COMMUNITIES COMPETING NEWSPAPERS CAN EXIST ONLY IF MERGER OF THE BUSINESS ACTIVITIES OF THE EXISTING NEWSPAPERS IS PERMITTED.

The factual basis for our contention that the alternative to a merger of the business departments is a newspaper monopoly appears both in the record of this case and in facts of which the Court can take notice.

A. The Continuing Economic Pressure Toward Single Publisher Communities.

The trend toward newspaper concentration has been recognized for over 75 years.[9] In 1909-1910, there were two or more competitive newspapers in 689 cities, 57% of the cities with daily papers.[10] By 1951 "81% of all daily

[9] "There is a trend in the United States towards one-publisher communities either in the sense that the marginal newspapers disappear or that all papers in one community are published by the same publisher. This trend is observable from about 1890." Paul F. Neurath, *One Publisher Communities: Factors Influencing Trend,* 21 Journalism Qu. 230, 240 (1944). See to the same effect, 61 Yale L.J., *supra,* at 949-951; Merle Thorpe, *The Coming Newspaper,* New York, 1915, p. 19; James E. Pollard, *Principles of Newspaper Management,* New York, 1937, pp. 6-15; Charles V. Kinter, *The Changing Pattern of The Newspaper Publishing Industry,* The American Journal of Economics and Sociology, Vol. V, 1945, pp. 52-53.

[10] Def. Ex. 121, taken from Nixon and Ward, *Trends in Newspaper Ownership and Inter-Media Competition,* 38 Journ. Qu. 3, 5 (Winter 1961).

newspaper cities had only one daily paper; 11% more had two or more publications, but a single publisher controlled both or all. In that year, therefore, only 8% of daily newspaper cities enjoyed the clash of opinion which competition among publishers of their daily press could provide.'"[11] By 1960 the 8% had dwindled to 5.4%, or 79 cities, 18 of which had joint operating plans.[12] By 1968 the percentage had fallen to 4.6%, or 66 cities, 21 of which had joint operating plans.[13]

Another tabulation in the record shows that there were 64 cities with two or more separately owned papers without joint operating plans in 1961, but only 43 in 1965. (Def. Ex. 63a and b.) Of these, 19 were in metropolitan areas having populations much larger than Tucson—15 over 1,000,000, two between 650,000 and 1,000,000, and two between 500,000 and 600,000.[14] (Def. Ex. 63a, 125, 126.)

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[11] *Times-Picayune* v. *United States,* 345 U.S. at 603, and authorities there cited. These included an article by Professor Raymond B. Nixon, written in 1945, entitled *Concentration and Absenteeism in Daily Newspaper Ownership,* 22 Journ. Qu. 97 (1945).

[12] Def. Ex. 121.

[13] The figures are brought up-to-date in Nixon, *Trends in U.S. Newspaper Ownership: Concentration with Competition,* 14 Gazette, No. 3, 1968, International Journal of the Science of the Press (Univ. of Amsterdam, Holland) p. 181, hereafter cited as Nixon, 1968.

[14] All populations referred to in this brief are from the most recent official census, taken in 1960 by the Bureau of the Census, United States Department of Commerce (U.S. Bureau of the Census, *U.S. Census of Population: 1960,* Vol. I, *Characteristics of the Population,* Part A, Number of Inhabitants. U.S. Govt. Printing Office, 1961).

This leaves less than 25 areas in the United States (out of over 1400 with daily newspapers) containing less than half a million people which still have two independently owned metropolitan dailies (without a joint plan), and, as has been shown, the number has been steadily declining.

Of the cities of the same general size as Tucson, only one out of 21 has separately owned papers without a joint plan,[15] and this city, Sacramento, is in a metropolitan area of over half a million.[16] Indeed, Defendant's Exhibit 126 shows only five of 33 metropolitan areas with a 1960 population between 650,000 and 300,000 (substantially larger than Tucson),[17] having more than one publisher. And in two of these five areas (Fort Worth and Sacramento) the metropolitan area population exceeded half a million. In one (Nashville) there is a joint operating agreement similar to that in Tucson, and in the remaining two (Springfield-Holyoke, Massachusetts, and Utica-Rome, New York) the two papers were published in different cities in the area. (Def. Ex. 126.) (The record is silent as to whether both papers in these communities were prospering or whether one was failing.)

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[15] Def. Ex. 135.

[16] Def. Ex. 126. Def. Ex. 135 lists *cities* with 1960 population between 190,000 and 291,000, but not the population of the metropolitan areas; it is thus not on the same basis as the figures described in the preceding paragraph. It lists Miami as a city with separate ownership but no mutual plan, but the Miami papers entered into a joint operating contract in 1966. Def. Offer of Proof, Feb. 13, 1967; Editor and Publisher, Aug. 6, 1966, p. 9.

[17] The population of the Tucson metropolitan area in 1960 was 265,660. *U. S. Census of Population: 1960,* Vol. I, *Characteristics of the Population,* Part 4, *Arizona,* Table 11, p. 4-10.

With few exceptions, in the words of Professor Nixon, writing in 1968:

> "... The pattern today is clearly for only one daily in cities up to approximately 150,000 population; a morning and an evening paper under single ownership or in joint operating arrangements in cities from 150,000 to 650,000; and two or more competing dailies only in cities of more than 650,000. The size of a community required to support a paper of any given frequency has been going up ever since the depression years."[18]

See also Jones Dep., p. 20. Professor Nixon concluded that:

> "... there has been no successful new general daily started in any non-suburban city of more than 200,000 population since 1941. Even that paper, the Chicago *Sun*, with a millionaire department-store owner behind it, had to merge with another daily into the present *Sun-Times* before it became commercially profitable."[19]

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[18] Nixon, 1968, p. 185. The record indicates that as of 1962 in the 13 metropolitan areas with populations between 650,000 and 1,000,000, six had two publishers, but in two of these areas (Columbus and Miami) there is now a joint operating plan, and in two others (Tampa-St. Petersburg and Albany-Schenectady-Troy) the separate papers are published in different cities. (Def. Ex. 126). In Indianapolis, which the exhibit shows to have two publishers, one ceased operating in 1965. Editor and Publisher, Oct. 16, 1965, p. 15.

[19] *Id.* at 187. In 1947, Professor Chafee observed: "It is not healthy that the only two large newspapers to be started in our time—*PM* and the *Chicago Sun*—are both financed out of tax losses. Will profits after taxes ever again be ample enough to create a newspaper?" 2 Chafee, *Government and Mass Communications* (1947), p. 652. The *Oklahoma Journal*, published in Midwest City, Oklahoma, a large suburb of Oklahoma City, may be an exception, but it has been in existence only since 1964.

The factors which have caused newspapers to disappear have not been limited to those cities which by now have been reduced to one publisher or to cities of that size. New York City, with a population of 7,781,984, provides vivid proof that the still continuing attrition is no respecter of size or population. A representative but by no means exhaustive list of daily newspapers once published in New York would include the *Herald, Times, Tribune, World, Evening World, Mail, Telegram, Globe, Morning and Evening Sun, Evening Post, American, Journal, News, Mirror, Call, Brooklyn Eagle, Standard-Union, Citizen,* and *Graphic.* In viewing this situation in 1965, the London *Economist* stated that "[a]t first glance the surprising thing about the New York city press is that there are only six metropolitan dailies for 8 million readers. But closer inspection reveals that perhaps even more surprising is the fact that the six dailies manage to sustain themselves at all. Indeed, only two of the papers—the *New York Times* and the *Daily News*—are profit makers with the Times' margin consistently a narrow one."[20] The death of the *World Journal Tribune* in May, 1967, left only three survivors, the *Times,* the *Daily News* and the *Post,* and each of these serves a substantially different market. Although the circulation of the *Times* is substantially less than that of the *Daily News,* it is still almost 1,000,000 (daily),[21] and for practical purposes the *Times* is without

[20] The (London) *Economist,* May 22, 1965, p. xi.

[21] Of 959,608 total daily circulation, 539,474 is outside of New York City and 232,647 or 24.2% is outside of the New York City Retail Trading Zone. Out of 1,587,563 total Sunday circulation, 537,700 or 33.8% is outside of the New York Retail Trading Zone. These figures are from the sworn Publisher's Statement, Audit Bureau of Circulations, for the 6-month period ending March 31, 1968.

competition in a reader and advertising market—both in and out of the New York area—not shared by the other New York dailies. The fate of the *Herald Tribune* proved that even such a vast market could not support two competing newspapers.

So wide-spread a trend, in which the number of cities with two or more publishers has declined from 689 in 1909 to 66 in 1968,[22] cannot be attributed to isolated phenomena, such as "bad" management by particular publishers. On the contrary, the long and continuing movement toward one-publisher cities is, and must be, due to economic factors which have affected the entire newspaper business for many years.

These factors have been summarized by Professor Nixon as follows:

> "The decline of locally competing units in the newspaper business, as in other phases of American life, has been due to economic factors for which no single individual or groups of individuals can be held responsible. In the newspaper business these factors include the loss of advertising revenue to radio and television, the demand of readers for more expensive services, the preference of advertisers for fewer media, with larger circulations, and the rising cost of newsprint, ink, machinery, buildings, labor, taxes, and everything else that goes into the making of a newspaper. For many dailies it has been a case of 'death or consolidation', even though the surviving paper or combination of papers usually has gained strength and stability through its inheritance of a noncompetitive field.'"[23]

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[22] Def. Ex. 121; Nixon, 1968, p. 184.

[23] Nixon, *The Problem of Newspaper Monopoly*, in *Mass Communications*, Wilbur Schramm, editor, Second Edition, 1960, p. 243. (Originally published in *Communications in Modern Society*, University of Illinois Press, 1948.)

Advertising is, of course "the economic mainstay of the newspaper business" (*Times-Picayune* v. *United States*, 345 U.S. 594, 604 (1953)), producing over 70% of newspaper revenues (Fdg. 67.) Since 1935 the newspaper share of all advertising has declined from 42% to 29%, and its share of advertising in the major competitive media (newspapers, radio, television and magazines) from 72% to 49%.[24] With the simultaneous expansion of the American economy and of the importance of advertising, together with the rise in the price level, this has not meant that newspaper advertising revenues are less than formerly. But the "tremendous increase in cost of operation and cost of production" (Tr. 701-2, 844-45, 1186-87, 1316-18, 2444; Jones Dep. 25-27) has meant "that costs of labor and materials have been rising at a faster rate than can be covered by increased circulation and advertising revenues" and this "has been the cause of several recent newspaper failures and mergers."[25]

The increase in expenses has not resulted merely from the higher cost of labor, supplies and equipment. Over the years the ever increasing variety of newspaper content and services demanded by the reader has made the metropolitan newspaper of today a different product than it

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[24] McCann-Erickson estimates, published annually in *Printer's Ink*.

[25] Leslie W. McClure and Paul C. Fulton, *Advertising in the Printed Media*, New York, 1964, p. 59. See also, Charles V. Kinter, *The Changing Pattern of the Newspaper Publishing Industry*, The American Journal of Economics and Sociology, Vol. 5, 1945, p. 43; James E. Pollard, *Spiraling Newspaper Costs Outrun Revenues 1939-1949*, 26 Journalism Qu. 270 (1949).

has been in the past.[26] Thus the daily newspaper—not to mention the Sunday edition of a metropolitan paper—has become more and more voluminous, and this has greatly aggravated the effect of the increase in costs.

The consequence has been that except in the most populous communities—and even in some of them[27]—the revenues have been insufficient to support completely separate papers. (Tr. 1187, 2444; Lang Dep. 38-41; Jones Dep. 25-29).

Nor does the inability of two newspapers to survive result only from such economic factors as increasing costs and the competition of other media for advertising. A basic contributing factor is the unique nature of the newspaper publishing business. Newspapers are limited, to a degree that other entrepreneurs are not, by factors of place and time. A newspaper cannot indefinitely expand its geographic market; it is tied to its community.[28] A substantial portion of its content, both news and advertising, is of local concern, and will be of diminishing interest the farther the paper gets from the principal city. How far

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[26] "People want news, they want comment, they want entertainment through the printed page, they want general information, they want information concerning the availability of goods and services . . ." Malcolm M. Willey, *The Functions of the Newspaper,* The Annals of the American Academy of Political and Social Science, January, 1942, Vol. 219, p. 19.

[27] See p. 13, *supra.* Experience in San Francisco (Smith Dep. 7-11, 15) and Pittsburgh (Tr. 1166-1169) establishes that in some areas of over 650,000 the same difficulties have arisen.

[28] With the exception of the *Wall Street Journal, Christian Science Monitor,* and to some extent the *New York Times.*

the paper can be distributed is also limited by the time in which it can reach the subscribers. There is nothing as obsolete as old news, and old newspapers are of value only to the junk man.[29] Thus there are definite limits to the extent to which the publisher can enlarge the demand for his product by geographic expansion.

The time factor—the perishability of news—has perhaps even greater significance. A newspaper "has to be designed anew each day;"[30] the new model once a year which suffices for other industries is not enough. "The special type of overhead costs involved in designing, developing and putting into production a new product"[31] thus must be borne by newspaper publishers every day.

And these are what Professor Reddaway (of Clare College, Cambridge University) described as "first copy

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[29] "The daily newspaper is a product with characteristics similar to few other consumer goods. As a newspaper publisher once aptly put it—'The daily newspaper industry is the only industry where you gather your raw materials in the morning, process and fabricate them into a product in a few hours, distribute the product in a few minutes, close your books at the end of each day's operation, and sell the unsold portion of the product the next morning as junk.' The high perishability of news, the rapidity of production and distribution, and the dual source of income position of the newspaper industry sets it apart from other manufacturing industries although it operates in the same economic environment as do these other industries." John Scott Davenport, *Newspaper Circulation,* Dubuque, Iowa, 1949, p. 1.

[30] W. B. Reddaway, *The Economics of Newspapers,* The Economic Journal, Vol. LXXIII, June 1963, p. 201.

[31] *Ibid.*

costs," incurred before the first copy is sold, and irrespective of how many copies are made. The proportion of the costs incurred without regard to the number of papers distributed, and the lack of value in the product after a few hours, make it essential that the publisher maximise his circulation. The more copies sold, the less each copy costs. And even more importantly, the more advertising the paper will be able to attract.

The final factor which makes a newspaper publisher particularly vulnerable is that he is "really producing two different products, and selling them in two different markets; he is selling 'copies' of the newspaper to readers, and selling 'advertising space' to advertisers."[32] If these two products were separable, like automobiles and radios, for example, this might be of minor consequence. The newspaper business is different, however, because as Professor Reddaway points out, "the demand for one of the products (advertising space) [is] greatly affected by the sales of the other (copies)."[33] The publisher with the largest circulation will be able to command higher prices for his advertising, which will in itself give him a competitive advantage since his costs will not be proportionately increased.

Furthermore, and this eventually becomes disastrous to the weaker paper, it is the practice of advertisers to concentrate their patronage in the paper with the larger

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[32] *Ibid.*

[33] *Ibid.*

circulation.[34] Advertisers find "it cheaper to buy space in one paper with general circulation, even at increased rates, than in two with overlapping coverage."[35]

As a result the weaker paper will have less money to finance its news and editorial activities. In time they will deteriorate, thereby placing the paper at an even greater disadvantage with respect to both circulation and advertising (Tr. 2430-32). This spiral process, of one paper downward and the other upward, is a continuing one (Tr. 847, 2432-33; Lang Dep. 30-31; Jones Dep. 10-11; Smith Dep. 19, 22, 36-39).

The court below described the existence and effect of this spiral relationship as follows (Fdg. 68):

> 68. The quality, circulation, and advertising revenues of a newspaper are interrelated. Generally, as the quality of a newspaper improves it receives wider public acceptance and its circulation increases. As the circulation increases, the newspaper becomes more attractive to merchants as an advertising medium and advertising revenues consequently increase. The increased revenues in turn, enable the publisher to

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[34] This is not true in exceptional situations, such as that in New York City, where the *New York Times*, despite its smaller circulation, reaches a different class of customers than does the *Daily News*. See pp. 14-15, *supra*.

[35] Frank L. Mott, *American Journalism*, p. 635 (1947). See to the same effect, 61 Yale L.J., *supra*, at 998-1001; Reddaway, *supra*, pp. 213, 216; McClure and Fulton, *Advertising in the Printed Media*, pp. 59-60 (1964). This is true even if advertising rates are proportionate to circulation. For if two newspapers with circulation of 60,000 and 40,000 charge 60 cents and 40 cents per line, the inevitable overlapping of subscribers means that the advertiser in both papers is getting fewer additional subscribers for his dollar in the smaller.

> increase his expenditures on the news and editorial staff, wire services, and syndicated features and otherwise improve the quality of the newspaper. As a corollary to this process, it is to be expected that if the quality of the newspaper falls, there will be a loss of circulation to other publications, which will adversely affect newspaper advertising revenues, and a decline in advertising revenues will further adversely affect the quality of the newspaper, resulting in a further decline in circulation.

The unsuccessful paper cannot avoid its difficulties through rate adjustments. An increase in its advertising rates would give the leading newspaper even more of an advantage. A decrease would only lessen the amount of total revenue and thereby accelerate the deficit. If the reductions were significant enough to attract advertising from the paper with the larger circulation, the latter, with lower costs per copy, could meet the rate reduction and better stand the loss. Thus the weaker paper will be unable to engage in, or at least to succeed in, any prolonged contest for circulation and advertising (Tr. 2434). "In full-scale price competition with more efficient rivals, the smaller daily's cost handicap may lessen its chances for economic survival."[36] As a result "any paper which gets left seriously behind in the circulation race is apparently doomed to extinction".[37]

The same factors make even more unlikely a successful new entry into a market in which a competitor has failed. See the discussion at pages 26-30, *infra*.

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[36] 61 Yale L.J., *supra*, at 999.

[37] Reddaway, *supra*, at 216.

B. A Joint Operating Plan is the Only Feasible way to Preserve Competition in Cities which cannot Support Two Completely Separate Newspapers.

This leaves three alternative consequences which will flow from the incipient failure of a newspaper disadvantaged by reason of the factors described above. The failing newspaper may simply fail, disappear and not be replaced.[38] This leaves the city with one newspaper.

The second alternative is that the stronger publisher either moves into the field vacated by the weaker and establishes its own second paper, or acquires the weaker paper before it expires. (Since no other purchaser would wish to put himself in the weaker publisher's position (Lang Dep. 41-42; Smith Dep. 39-41; Jones Dep. 29), the latter would be able to sell only to the stronger survivor, as occurred in Phoenix, Santa Barbara (Tr. 770); Milwaukee (Tr. 836); Grand Rapids, Roswell, Raleigh (Tr. 837); and five cities in Texas (Tr. 886), for example.) By combining the printing, advertising and circulation departments of the two papers the surviving publisher can make the acquired paper profitable. There would continue to be two newspapers in the community, but only one publisher and (at his option) one editorial voice.

Thus, whether the surviving publisher does or does not replace the unsuccessful paper, the result is, as it has been in most American cities, a complete monopoly, which does not violate the antitrust laws because it results from "natural" economic factors. Nevertheless, this is not in the public interest if anything better is practicable.

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[38] This is what would have happened in San Francisco if a joint operating agreement had not been reached (Smith Dep. 18, 44).

In other types of enterprises, when the community cannot support two competitors there is no alternative to such a "natural" monopoly. But the distinctive nature of the newspaper business does provide an alternative. Because it has two different elements, the news and editorial branch can remain wholly competitive even if the economic factors referred to above will not permit two papers competitive in all respects to survive.

In order to accomplish this result, the plan for the merger of the business departments was adopted by these *amici* and other publishers in a number of cities, beginning in Albuquerque in 1933 (Lang Dep. 24). There have been over 20 such arrangements, many of which, such as that in Tucson, have been in effect for many years. Although their existence was well known,[39] none was challenged by the Government until this case was brought in 1965.

Obviously the partial merger is less anticompetitive than a complete merger or, for that matter, the suspension of operations by the failing newspaper leaving only a one daily city or a one owner city. Although the effect may be to reduce rate and other competition between the commercial departments of the two newspapers, this competition would have terminated in any event if one of the papers had either suspended operations or merged completely with the other. On the other hand, the partial merger permits the continued publication of two separately owned newspapers under separate editorial direction. In Tucson, the two papers have "engaged in intense rivalry with each other in the composition of news and editorial material"

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[39] Nelson P. Poynter, *The Economic Problems of the Press and the Changing Newspaper,* Annals of the American Academy of Political and Social Science, Vol. 219, January, 1942, pp. 82, 85-86; Raymond B. Nixon, *Concentration and Absenteeism in Daily Newspaper Ownership,* 22 Journalism Qu. 97, 104 (1945).

(Fdg. 31). This has also been the case elsewhere (Lang Dep. 16-17; Smith Dep. 42-43).

The consequence is that the partial merger is entirely beneficial to the public both in respect to the antitrust policy of maintaining competition and to the strong community interest in fostering the expression of diverse views.

C. The Government's Factual Contentions are Unsound.

The Government has advanced various factual and legal arguments in opposition to the essentially simple proposition that a partial merger is more consistent with antitrust policy than a complete merger or a lawful monopoly. None of its contentions is sound. We shall deal with its factual contentions here, and with its legal arguments in Point II.

1. *The Failing Business Doctrine Applies.* Despite the uncontradicted evidence that the Citizen had been operating with substantial losses from 1932 until the making of the 1940 agreement, the Government insists that it was not a failing newspaper and that therefore the failing business exception to the prohibition against mergers does not apply. We believe the Government clearly wrong as to this, for reasons which will undoubtedly be fully set forth in appellant's brief. The Citizen was failing in the most obvious and ordinary sense of steadily losing substantial sums. The willingness and ability of its stockholders to absorb these losses for a number of years should not mean that they must continue to do so.

Moreover, the public interest in maintaining independent editorial voices cannot be served unless a failing newspaper is salvaged before it has reached the point of bankruptcy. If a manufacturer of shoes or other ordinary commodities finds it necessary to suspend operations, or if bankruptcy is so imminent as to remove him as a competitive factor from the market, he still has plant equipment,

inventory and the like which are of value. A competitor who might acquire those assets by purchase or merger could use them to manufacture or sell additional quantities of shoes. This cannot happen with a newspaper. From the purely practical standpoint, the physical plant and equipment is virtually without value to a competitor who would already own a plant capable of roughly double the use to which it is being put. Of inventory, at least in the sense of valuable finished product, the newspaper has none. What it has to offer is its personnel, its news and feature franchises, its distinctive and individualistic character or personality—in short, whatever gives it a measure of public acceptance. If the inroads of economic adversity have so undermined the ability to produce an editorial product that much of its reader and advertiser acceptance has been lost, there will be no editorial voice which can be saved by a joint operating plant—and *a fortiori* by any other alternative. Thus if the two editorial voices are to be preserved, the failing paper must be saved before its reaches the brink of destruction.

In any event, the position of the *amici* is posited on the premise that a merger of the business operations of two newspapers will be lawful only when and because one of the two would not otherwise survive. This would have to be established in each particular case.[40] The point of vital

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[40] Obviously the condition of the papers at the time the joint agreement was made must determine its validity, for it is at that time or shortly thereafter that one of the existing papers will otherwise fail. Moreover, the joint arrangement must not be subject to dissolution because it proves to be successful, or no one would enter into it. A failing newspaper would never be saved if the test of *United States* v. *Du Pont & Co.* (General Motors), 353 U.S. 586, 597, were to govern—if a merger or joinder undertaken to save a failing company and preserve *some* competition had to be undone if at the time of suit many years later the merged operation were

import to the *amici* is whether the Court accepts the principle that, once this is proved, the failing business doctrine enables the business departments of a newspaper to be merged while the editorial activities continue to be operated independently of each other by different publishers. This would seem to be the way in which the Antitrust Division construed the law from 1933 until the initiation of this case in 1965.[41]

2. *There is no likelihood of a new entry into the market.* The Government has also argued that it is better to permit the weaker newspaper to fail or to merge completely with the surviving competitor. The theory apparently is that this "may" clear the way for a new entry into the market.

This is a theory only, completely inconsistent with the economics of the industry as established by what has happened over the last three-fourths of a century. By hypothesis, the communities with which we are concerned cannot support two completely separate newspapers.

If the weaker paper be allowed to fail, as the Government is willing to permit, the only publisher who would be able to take its place without being subject to the same, and indeed substantially greater, difficulties would be the surviving one in the community. The economies which result from joining the business functions of the morning and

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(Footnote 40 continued)

prospering. Particularly must this be true when the result would be (as in Tucson) that one of the papers would again almost certainly be in the inferior position which would start the inevitable spiral downhill again. We submit that the *Du Pont* test was not developed for this type of situation.

[41] See defendant's offer of proof, April 28, 1966, which shows that the facts with respect to the joint operating plans in Pittsburgh, Honolulu, and San Francisco were called to the attention of the Antitrust Division and that it took no action.

evening newspapers are available to him alone—and, again our hypothesis (which corresponds to the facts in the cities in which *amici* operate) is that only by reason of such economies is it economically feasible to publish two newspapers in the community.

An outsider unable to economize in this way would be stepping into the shoes of the failing newspaper. If a paper with established circulation and good will could not profitably remain in the market, a newcomer starting without such advantages would have even greater difficulty in entering. Clearly there is a better chance of saving an existing paper than of starting a successful new one.

The handicap facing a prospective new entrant would, of course, be even greater if the failing paper merged completely with the surviving publisher.

The reason why this is so goes beyond the large initial capital cost of starting a new enterprise. "The temptation to invest the requisite amount of capital in a newspaper enterprise, which must crowd its way with slow and difficult steps against well-fortified opposition, is not the same as that which leads continually to like investments in ordinary business ventures, because the advance toward success cannot be made by gradual steps on a scale of expenditure proportionate to the ratio of income. To succeed, such an enterprise must at once present itself as the equal, if not the superior, of those it finds occupying the field, and must continue to hold its own in this respect until it has thoroughly convinced the constituency that slowly gathers around it of its permanent excellence, all the time submitting to a daily outgo largely in excess of the income."[42]

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[42] S. N. D. North, *History and Present Condition of the Newspaper and Periodical Press of the United States* (U.S. Census Office, 1884), p. 98.

This strikingly prophetic early analysis of the difficulty facing a new entrant into the newspaper business has been often reiterated. In 1918 New York Globe publisher Jason Rogers stated:[43]

> "I would not for a moment think of trying to build up from a standing start and grow by gradual stages as so many have tried to do in the past and failed. There was a time when a man could win out by such processes, but that has gone long since. No newspaper can secure a foothold unless it is a real newspaper and a finished product. The public will not buy and support with their subscriptions something that is in the making. Many a man has gone hopelessly bankrupt because he has felt that he could start a newspaper to fill a long-felt want with the hope of ultimately winning support on a large scale."

In a Nieman Report, Professor McEvoy of the Indiana University Department of Journalism observed in 1954:[44]

> "Because your competitor is operating on a momentum of reader and advertiser habit, you cannot start out your new newspaper on a small scale and gradually better the product. Your very first newspaper product must be better than the existing newspaper."

The same conclusion was reached by Professor Reddaway as to the similar experience in Great Britain:

> "... the chance of any new paper coming into existence in a genuinely competitive class seems very small,

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[43] Jason Rogers, *Newspaper Building* (N.Y. 1918), p. 82.

[44] Poynter McEvoy, *The Reader Needs a 10¢ Newspaper,* Nieman Reports, July, 1954, p. 6.

since it must start from even farther behind in the circulation race." [45]

A study of *Local Monopoly in the Daily Newspaper Industry,* 61 Yale L.J. 948, 1001 (1952), notes that:

> "[t]he structure and organization of the circulation and advertising markets exert pressure on small competing papers to suspend publication or to combine and achieve more efficient operations. This prospect, together with the difficulties of raising initial capital, will also discourage entry into the field by potential publishers. In short, the condition for viable newspaper multiplicity hardly exists."

The difficulty in starting up a second newspaper in any field is well illustrated by the unwillingness of such experienced and prosperous publishers as the New York Daily News, the New York Times and Time Inc., to start a second evening newspaper in New York City. One would think that if Tucson or cities of similar size could support separate morning and evening newspapers, as the Government claims, New York City, which is at least 25 times as populous, could support two of each. But no publisher has been willing to take the gamble in New York.

For the last 30 years the new daily papers which have been successful have been established in new markets such as Oak Ridge, Tennessee, and Cocoa, Florida, or in populous suburban areas (such as the Long Island suburbs of New York City), where they were either able to concentrate on local news or could draw on populations of metropolitan size. In cities substantially larger than Tucson,

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[45] W. B. Reddaway, *The Economics of Newspapers,* The Economics Journal, Volume 73, pp. 201, 216 (June, 1963).

even such rapidly growing areas as Phoenix[46] and Atlanta,[47] where there were newspapers already in existence, attempts to enter the market have been singularly unsuccessful.

These facts are, of course, well known to publishers or potential publishers. They explain why there have been hardly any successful entrants into existing metropolitan newspaper markets for over a quarter of a century. See p. 13, *supra*. Particularly will this be true in communities in which a going newspaper has been unable to continue an independent operation. A new entrant would know that he would almost certainly begin with a circulation even lower than that of the previously failing paper and, therefore, would have even less chance of success.

The experience of the newspaper industry over many years thus refutes the Government's unsubstantiated conjecture that, if one paper is allowed to fail, a new and presumably more efficient and successful one will enter the market in its place. This has not happened, and there is no good reason for believing that it is likely to happen in the future. The movement is entirely in the opposite direction. Economics and history combine to teach that the only way in which two separately owned metropolitan newspapers can continue to be published in most American communities is through a partial merger of the sort undertaken in Tucson.

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[46] *Arizona Journal*, suspended, Editor and Publisher, Jan. 26, 1963, p. 9; started up again, *id.*, Aug. 31, 1963, p. 10; final suspension, *id.*, May 9, 1964, p. 18.

[47] *Atlanta Times*, suspended, Editor and Publisher, Sept. 4, 1963, p. 13.

3. *Combining the physical assets is not sufficient to save the second paper.* The Government says that it does not object to morning and evening newspapers combining to use the same presses and delivery trucks, and that the economies resulting from this should be sufficient to keep the weaker paper from failing without merging the advertising and circulation departments. The record shows without contradiction that this is not so even now in Tucson; the weaker paper would operate at a loss if required to operate separate advertising and circulation departments (Tucson: Tr. 1820-22, 1872-73, Def. Ex. 163; Tr. 1624-27, 1669-70. In general: Tr. 753-54, 1175-77, 1196-97; Lang Dep. 44-50; Smith Dep. 45-46). This would have been even more clearly true at the time the 1940 agreement to merge those departments was made.

Apart from this, however, the Government's *per se* position, accepted by the court below, would bar a merger of the advertising and circulation functions, even when it can be established without question, as it can by these *amici*, that use of the same printing presses and delivery trucks would not produce enough savings to permit the weaker paper to survive.

4. *The survival — so far — of two publishers in a few small cities does not prove that other cities can support two publishers.* The Government has referred to the fact that in 1965 23 cities no larger than Tucson still had two or more competing daily newspaper publishers with separate business departments (Def. Ex. 63a). Nine of these cities are said to be in the 100,000 to 400,000 population range. (Of these nine, Miami has since adopted a joint plan and Oklahoma City, Fort Worth and Sacramento are in metropolitan areas with over 500,000 population. Cf. Def. Ex. 63a and 126).

The number of cities with two publishers and under 400,000 population dropped from 101 in 1945 to 41 in 1961. (Def. Ex. 122). The number in the 100,000 to 400,000 range dropped from 34 in 1945 to 12 in 1961 (*ibid.*), and to 8 in 1966. (Def. Ex. 63a minus Miami). There is no reason to believe that this trend will not continue. On the Government's theory, however, because three out of 417 cities of under 10,000 population (Def. Ex. 122) sustained competing papers, all cities in that range are to be assumed to be able to do so. It is much more likely that the few exceptional cities benefit from special circumstances — or that they, too, will soon fall to the economic forces which have prevailed elsewhere.

In any event, what has occurred in less than 5% of the communities with daily newspapers clearly does not refute the conclusion as to the economic forces generally applicable, or establish that in other communities, or in any one particular community, a second publisher can survive absent a partial merger of the sort here involved. A publisher in a particular city is entitled to an opportunity to prove that he is faced with otherwise insurmountable difficulties, and that his community cannot otherwise support a second separately owned daily newspaper. The Government's invitation to the Court to assume that the experience of a very small minority of cities can be taken as universally applicable or controlling — and that is what its *per se* theory means — cannot, in good sense, be accepted.

5. *Suburban newspapers do not replace failing metropolitan newspapers.* The Government also may assert that a number of suburban newspapers have sprung up in recent years, that they are operating successfully, and that they are in a position to replace failing metropolitan newspapers.

It is undoubtedly true that the total number of daily papers has remained approximately the same (around 1,750) since 1945.[48] As cities grew, new papers were established in cities where there were no daily papers before, as well as in the expanding suburbs. The suburban papers are not, however, the equivalent of the large metropolitan dailies published in the principal cities. Except perhaps in those suburban areas which are populous enough to support major newspapers of their own, such as around New York City, the suburban papers meet and fill a different need. They concentrate on local, often personal, news and advertising, not on national and international affairs. Their features in both quantity and depth are not comparable to those of the metropolitan dailies.

Undoubtedly, the suburban and the metropolitan papers compete in local news and advertising, and in circulation in the suburbs. In particular, the suburban paper may undercut the second and weaker metropolitan daily and accelerate its downward spiral, since many persons will prefer one large metropolitan paper and one local paper to two of the former.

But the ability of the suburban publishers to perform successfully their suburban, and perhaps ancillary, function would not immunize them from the economic factors which have prevented other publishers from entering the main metropolitan arena, if they chose to do so. For a suburban publisher to invade the metropolitan field would require the same large capital investment and machinery, and subject him to the same difficulty in reconciling costs with revenues as have frustrated other new publishers attempting to enter the market — not to mention the older pub-

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[48] See Nixon, 1968, *supra,* at p. 184.

lishers who were unable to survive, even though they started in a vastly superior position.

Thus, the remote possibility that a suburban publisher might fill the void left by a failing newspaper provides no adequate basis for assuming, contrary to the evidence in this case and to general experience throughout the nation over the past 50 years, that a particular community in which one of the two existing papers is failing can support two fully competitive metropolitan dailies.

II.

WHERE EDITORIAL INDEPENDENCE CAN ONLY BE PRESERVED BY JOINDER OF THE BUSINESS FUNCTIONS OF TWO NEWSPAPERS, ONE OF WHICH WOULD OTHERWISE FAIL, THE JOINDER DOES NOT VIOLATE THE ANTITRUST LAWS.

We have shown that in communities such as Tucson two newspaper publishers operating completely independently cannot both survive. Where this is so, as it has been proved to be in over 97% of American cities, the public interest is advanced by permitting a joinder of the commercial aspects of the newspaper business in order to maintain competition on the highly important news and editorial side. Since the effect is to preserve competition, not to destroy or restrain it, such a result is not only consistent with the policy underlying the antitrust laws — it tends to effectuate that policy. It seems obvious that the function of a court in interpreting or applying the antitrust laws is to do so in a manner which will prevent and not cause monopoly.

The Government and the court below, invoking the *per se* doctrine, would disregard the facts which prove that partial mergers in these circumstances have the effect of

preserving, not impairing, news and editorial competition in the community involved. The Government would brand the merger of the business departments as unlawful *per se* even if in the particular case the evidence were to establish that the overall effect of merging the commercial operations would be to preserve news and editorial competition which would otherwise disappear, and not to eliminate any competition which would otherwise survive. It is this erroneous contention, and its acceptance by the court below, which present the question which is of primary significance to these *amici* as well as to the public in their communities.

The *per se* doctrine is not a mechanical formula unrelated to the purposes of the antitrust laws. It is applied to "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable." *Northern Pacific R. Co.* v. *United States,* 356 U.S. 1, 5 (1958); *White Motor Co.* v. *United States,* 372 U.S. 253, 262, 265 (1963). But merger of the business activities of newspapers in the circumstances here involved has a beneficial, not "pernicious," effect on competition, for in the absence of such agreements all competition between metropolitan papers in the area would disappear. An agreement the result of which is the "dissemination of news from [two] different sources" (see p. 4, *supra*) instead of one, thereby avoiding monopoly, certainly does not "lack . . . redeeming virtue" in terms of antitrust policy.

Thus, if the *per se* principle as this Court has described it were written into statute, it would not prohibit an arrangement which has the virtue of preserving a failing enterprise, even if only in part, and which results in competition rather than monopoly. A judge-made doctrine designed to effectuate the statutory policy should be no

less flexible or responsive to the purposes of the controlling statute. The *per se* rule was designed to implement the rule of reason, not to override it. It was not intended to prohibit conduct which "promotes competition," instead of suppressing or destroying it. *White Motor Co.* v. *United States,* 372 U.S. at 261, quoting from *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238.

The Government claims that three features of the 1940 agreement fall into the *per se* categories. If the agreement is to be pigeon-holed, however, we submit that it must be classified as a merger or joint venture, for that is what it was. The validity of mergers under Section 1 or Section 7 is determined only after examination of the facts, not on a *per se* basis.

All mergers are not unlawful, not even all horizontal mergers. The failing business situation has long been recognized as one in which a merger will not lessen competition, and accordingly is not unlawful. In *White Motor Co.* v. *United States,* 372 U.S. at 263-64, the Court reiterated that "A merger that would otherwise offend the antitrust laws because of a substantial lessening of competition has been given immunity where the acquired company was a failing one." See also *Brown Shoe Company* v. *United States,* 370 U.S. 294, 331; *International Shoe Company* v. *Federal Trade Commission,* 280 U.S. 291, 302-03.

The Court has also recently held that "Overall, the same considerations apply to joint ventures as to mergers, for in each instance we are but expounding a national policy enunciated by the Congress to preserve and promote a free competitive economy" (*United States* v. *Penn-Olin Co.,* 378 U.S. 158, 170). The Court there applied the criteria employed in merger cases to test the validity of the joint

venture (*id.* at 172). Thus it makes no difference whether the Tucson arrangement is regarded as a partial merger or as a joint venture. The same standard is applied.

As we have seen, there is no reason why in a failing business context a merger of less than all the activities of two companies, which enables the unmerged portion to remain competitive, should be governed by a more stringent test. Indeed, it is more reasonable to apply the failing business principle so as to permit the merger of no more of the existing enterprises than is necessary to prevent the elimination of competition than to insist that all or nothing be merged.

In any event, the *per se* categories do not fit in this situation. We will deal here with the charges of price fixing and profit pooling. (The provision in the 1940 agreement forbidding the Star or the Citizen or their shareholders or officers from engaging in any other publishing business or conflicting enterprise is not essential to the joint plan of operation, and for that reason this *amicus* brief does not discuss it.)

Price Fixing. Although the Government refers to the 1940 agreement as one for the fixing of prices, nothing in the agreement itself mentions prices or pricing at all. The Government and the trial court (Fdg. 19) rely only on the fact that under the agreement TNI, the company formed by the Star and the Citizen to operate the business activities of the newspapers, sets the advertising and circulation rates in the course of doing so. Since TNI was owned in almost equal shares by the Star and Citizen, the Government regards this as the setting of rates by the two papers jointly.

There can be no doubt that (to quote the clause of the agreement which is the most closely pertinent) TNI was

authorized to "manage and operate all of the departments of the publishing business . . . (excluding the news and editorial departments) . . . " (Agreement, para. 8), and that this included the management of the circulation and advertising departments. Since TNI sells the advertising and circulation, it determines how much it will charge. But to treat such control of the prices of the services it sells as price fixing by the merging departments would make every horizontal merger or joint venture unlawful *per se*. For every merged company or joint venture determines its own prices — even though they relate to previously competing products and even though the joint operation is managed by the same persons who previously managed the competing entities. And yet mergers or other joinders of competing enterprises are not unlawful if one of them is failing, or if the effect upon competition is insignificant, or if there would not otherwise be competition between the cooperating companies. *United States* v. *Penn-Olin Co.*, 378 U.S. 158.

The obvious effect of a horizontal merger between two non-failing enterprises is to preclude competition, including price competition, between the affiliating organizations. The fact that a merger has this inevitable effect does not bring it within the *per se* area. The same must *a fortiori* be true when competition is not injured by the merger because one of the companies would otherwise fail.

Profit pooling. Where two companies join in a single enterprise the revenues of the enterprise will normally be distributed in some way among its owners, who will be the constituent companies or their stockholders. The Government labels this distribution of revenues as "profit pooling," and says that this in itself causes the merger of newspaper business departments to be unlawful *per se*.

But if a division of revenues is unlawful *per se*, then all mergers and joint enterprises would be unlawful. This, of course, makes no sense as applied to otherwise valid mergers. Clearly unless the joint enterprise is unlawful in itself—and this is determined under the rule of reason or the standards of Section 7—it should not become so simply because the revenues are divided and distributed among its owners.

The Government's position also ignores the realities of newspaper publication. All newspaper revenues must come from the advertising and circulation departments. In the case of newspapers which are parties to an operating agreement, the revenues of the single business department thus support the editorial as well as the commercial activities. They must be distributed between the two publishers so that the costs of each can be met. Such distribution of the revenues does not constitute "profit pooling" in any relevant sense.

The court below accepted the Government's argument that what it characterizes as "profit pooling" is unlawful in all circumstances, but this position is supported neither by the authorities relied upon by the Government nor by any other. "The area of *per se* illegality is carefully limited." *Walker Process Equipment, Inc.* v. *Food Machinery & Chem. Corp.*, 382 U.S. 172, 178. And none of the familiar listings of *per se* violations (by Justices Black, Douglas, Brennan, Clark and Fortas) include "profit pooling."[49]

In the *Penn-Olin* case the Court noted that Olin and Pennsalt "each owns 50%" of the stock of the joint ven-

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[49] *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1, 5; *White Motor Co.* v. *United States*, 372 U.S. 253, 259-60, 265, 281; *United States* v. *Sealy Inc.*, 388 U.S. 350, 357, n. 5.

ture (378 U.S. at 163). This obviously meant that profits would be divided equally between the parent companies. After mentioning the fact, the Court does not further advert to it in its opinion, the remainder of which would have been unnecessary if the division of the profits in itself made the joint venture unlawful *per se*.

United States v. *Paramount Pictures*, 334 U.S. 131, 149, and *Northern Securities Co.* v. *United States*, 193 U.S. 197, 326-27, the two decisions cited by the Government, were cases in which companies perfectly capable of effective competition had entered into otherwise unlawful combinations, which, *inter alia*, pooled their profits. There was no statement in those cases that, apart from the other circumstances rendering the combination illegal, the distribution of receipts in designated ratios would always or *per se* be unlawful. A division of profits may well be unlawful in the context of a combination without legal justification, but the result is not necessarily the same for a merger lawful because a business is failing or for other reasons.

The Government has characterized the division of profits as "ancillary to the price fixing scheme" (Motion to Affirm, p. 16). As has been shown, there was no price fixing scheme. Both TNI's pricing of its products and the division of its revenues were ancillary to, or more accurately an inevitable ingredient of, the joint enterprise. If the latter is lawful because one of its members is failing, these features cannot make it less so.

As has been pointed out, *supra*, p. 3, the court below indicated agreement that in a failing business situation a complete merger of morning and evening newspapers would be lawful. But the court accepted the Government's theory that the 1940 agreement was not a merger, since the two

papers remained separate in their news and editorial activities, and that since the failing business doctrine had been applied only to mergers, it was inapplicable. This "all or nothing" approach—a complete merger of all departments being legal, but a merger of everything except news and editorial departments being illegal—causes an effort to preserve competition in that part of the enterprise of most importance to the public to become a vice instead of a virtue.

The antitrust principles reflected in this Court's decisions—the rule of reason, the *per se* rule, the failing business doctrine—are based on economic and legal substance, not the automatic application of verbal formulas. The failure to combine the editorial departments provides no reason for not treating the joinder of the business departments as a merger, which in substance it was. The Government's argument that the rules governing mergers, including the failing company doctrine, should not apply to partial mergers thus has no rational basis in antitrust policy.

The acquisition of a failing company by a competitor has been permitted because a company which fails will no longer be a "competitive factor in the market" (*Brown Shoe,* 370 U.S. at 319), and because the preservation of the enterprise in some viable form mitigates the otherwise injurious consequences to the shareholders "and the community where its plants were operated" (*International Shoe,* 280 U.S. at 302). The same reasons dictate that if an important part of the enterprise can be preserved as a competitive force, it should be. To permit a merger of all the activities of a failing company but not of only a part, in a way which enables the remainder to stay competitive, would be contrary to the policy of the antitrust laws and is certainly not compelled by the antitrust statutes or this

Court's decisions. But that is what the court below has done.

The above analysis applies to the Government's alleged grounds for relief under Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act.

Mergers which unduly restrain competition are forbidden both by Section 1 and Section 7. The tests applied are not very dissimilar, though Section 7 imposes a less stringent burden of proof on the Government. Compare *United States* v. *Philadelphia National Bank*, 374 U.S. 321, and *United States* v. *First National Bank of Lexington*, 376 U.S. 665. In recent years the failing business doctrine has usually been refefred to in a Section 7 context. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 319; *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291. But there can be no doubt that it also applies to mergers or joint ventures in cases brought under Section 1. It would be anomalous if Section 1 were more severe in this respect than the statute which was intended to impose a stricter prohibition. The reasons which caused the Court to hold that there was no impairment of competition in *International Shoe* (see p. 41, *supra*) apply under Section 1 as well. Indeed, the decisions relied on in *International Shoe* were Section 1 cases. *United States* v. *U.S. Steel Corp.*, 251 U.S. 417, 446-47 (acquisition by defendant of a failing company); *American Press Association* v. *United States*, 245 Fed. 91, 93-94 (C.C.A. 7, 1917). See also, *Beegle* v. *Thomson*, 138 F.2d 875, 881 (C.A. 7, 1943), cert. denied, 322 U.S. 743.

Even more clearly, Section 2 is inapplicable when the effect of a joint arrangement is to *prevent* a newspaper monopoly in a community which would otherwise have only

a single paper.[50] Where a market cannot support more than a single company, the resulting monopoly does not violate Section 2. ". . . 'A market may, for example, be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand.' . . ." *United States* v. *Aluminum Co.*, 148 F.2d 416, 430 (C.A. 2, 1945). "In the popular sense there is a monopoly if one person owns the only theatre in town. That usually does not, however, constitute a violation of the Sherman Act." *United States* v. *Paramount Pictures*, 334 U.S. 131, 171.

There can be no doubt that this principle applies to the many communities which cannot support two newspapers. *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 284 F.2d 582 (C.A. 1, 1960), cert. denied, 365 U.S. 833; *United States* v. *Harte-Hanks Newspapers, Inc.*, 170 F.Supp. 227 (N.D. Tex., 1959). In the *Union Leader* case, the Court referred to the parties (which had previously published newspapers in different cities) as enjoying (284 F.2d at 584):

> ". . . what might be termed 'natural' monopolies, as cities of the size in which they operate cannot support two good daily newspapers under present-day conditions. The court found that each paper came by its monopoly position in a lawful fashion, and correctly ruled that neither had 'monopolized' in violation of section 2. A monopolist does not violate the act if the monopoly is 'thrust upon it.' United States v. Aluminum Co. of America, 2 Cir., 1945, 148 F.2d 416, 429. . . ."

A monopoly is what would have resulted in Tucson, and in the cities in which these *amici* operate, in the absence

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[50] This brief is concerned only with the alleged monopoly resulting from the 1940 agreement, not the 1965 acquisition.

of the plan for joining the business functions of the existing newspapers. The failure of the weaker paper would have left only a single newspaper in the community.

Thus when one paper fails for economic reasons, the survivor is not an unlawful monopolist even if it takes over its failing competitor. The same conclusion must follow when the business functions of the existing papers are merged in order to permit the continuance of separate publications by independently owned news and editorial departments. A partial natural monopoly resulting from economic forces is less objectionable than a complete one. The preservation of some competition is better than no competition at all.

Indeed, the position of those who enforce the antitrust laws *should* be to attempt to encourage the joinder of the business departments of newspapers when this is the only way to preserve otherwise independent publications. For only in this way can antitrust policy and the policy embodied in the First Amendment both be effectuated in many American communities.

CONCLUSION

For the above reasons the District Court judgment, insofar as it involves joint operating plans, should be reversed.

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